

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER**

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UNITED STATES OF AMERICA,)	
Complainant,)	8 U.S.C. § 1324c Proceeding
)	
v.)	
)	OCAHO Case No. 96C00027
PEDRO DOMINGUEZ,)	
Respondent.)	Judge Robert L. Barton, Jr.
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AMENDED NOTICE OF FINAL PREHEARING CONFERENCE
(December 12, 1997)

The parties previously had been notified that, pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 556(c), and the Rules of Practice and Procedure, 28 C.F.R. § 68.13, a prehearing conference would be conducted by telephone in this case at 1 p.m. Central Time on Tuesday, December 23, 1997. However, on December 1, 1997, Respondent served a motion for extension of time to file certain exhibits and for a continuance of the hearing, which is scheduled to begin on January 12, 1998. Complainant had until December 11, 1997, to file an answer to Respondent's motion. Complainant did not file an answer to the motion but rather, on December 10, 1997, filed a document entitled a Response to Notice of Final Prehearing Conference (Response),¹ which includes, but is not limited to, a response to Respondent's motion. In the Response, Complainant asserts, among other things, that it opposes any further delay in this case but would be prejudiced if it had to wait until December 23, 1997, to obtain a ruling on Respondent's request for the extension and continuance. Therefore, I have rescheduled the final prehearing conference for December 18, 1997, at 9:00 a.m Central Time, and Respondent's motion for an extension and continuance will be considered as one of the first items in the conference.

Since this is the final prehearing conference, the parties shall be prepared to discuss the following:

- (1) any unadjudicated motions;

¹ The "Response" is an unauthorized filing. The Notice did not call for a response, and the OCAHO Rules of Practice do not authorize a response to a notice of prehearing conference.

(2) any unresolved disputed issues, including penalty, and any appropriate rulings on any unresolved issues;

(3) the witness lists, and the relevance and necessity of testimony described in the parties' witness lists, and which witnesses, if any, will be offering expert testimony;

(4) the exhibit lists and the relevance and admissibility of exhibits listed by the parties in their exhibit lists;

(5) the possibility of obtaining further stipulations or admissions of fact and/or documents which will avoid unnecessary proof, and advance rulings from the court on the admissibility of evidence;

(6) the avoidance of unnecessary proof and of cumulative evidence, and limitations on the use of testimony under Rule 702 of the Federal Rules of Evidence;

(7) possible settlement; and

(8) the form and substance of the final prehearing order.

See 28 C.F.R. § 68.13(a); Fed. R. Civ. P. 16(c).

As provided in the OCAHO Rules, 28 C.F.R. § 68.46, documents submitted as proposed exhibits in advance of the hearing shall be deemed authentic unless written objection thereto is filed prior to the hearing, except that a party will be permitted to challenge such authenticity at a later time upon a clear showing of good cause for failure to have filed such written objection. Therefore, pursuant to 28 C.F.R. § 68.46, during the December 18, 1997, Prehearing Conference the parties are ordered to raise any objections to the authenticity of documents submitted as proposed exhibits. Unless such objection is made, all documents submitted as proposed exhibits will be deemed to be authentic.

With respect to any exhibits listed in the respective exhibit lists that have not already been received in evidence, during the conference I will consider oral motions to admit the exhibits.² The

² During the April 1, 1997, prehearing conference I received in evidence Complainant's exhibits marked CX-B through E, CX-I, CX-O and Q, CX-BB through LL, CX-MM through CX-PP, CX-SS and TT, CX-VV, CX-XX, and CX-AAA and BBB. PHC(1) Tr. at 19. I reserved ruling on the admission of Complainant's other exhibits. I also received in evidence Respondent's exhibits that were attached to Respondent's response to the motion for summary decision. PHC(1) Tr. at 21-22. However, these exhibits were not the same as those identified in Respondent's exhibit list. Therefore, during the conference I will hear motions by the parties, and objections from the opposing party, on the admission of those exhibits that have not been received in evidence.

sponsoring party shall be prepared to discuss the relevancy of each exhibit and to offer the exhibit in evidence during the conference. The opposing party shall be prepared to state any objection to the exhibit. For any exhibit that has not been received in evidence prior to or during the final prehearing conference, the party shall state the name of the witness who will sponsor the exhibit.

With respect to witnesses, both parties will be expected to address the relevancy and necessity of certain testimony described in the witness lists, including objections to the testimony of any witnesses listed by the opposing party. For example, as to Complainant's Second Amended Witness List, I note that Complainant has identified eight potential witnesses who may testify during the hearing and all eight will testify as to penalty. The Court reminds Complainant that cumulative evidence should be avoided. See 28 C.F.R. § 68.40(b); Fed. R. Evid. 403. As to specific witnesses, Complainant lists Jose Flores, an Assistant United States Attorney, as a potential witness on penalty and states that he is expected to testify "as to the proceedings leading up to the plea agreement by Pedro Dominguez, the execution of the plea agreement, the plea and sentencing, the pre-sentencing report and the application of the sentencing guidelines." Complainant also references six exhibits on which this witness will testify; namely, the original indictment, the superseding indictment, the guilty plea, the transcript of the plea, the judgment and the transcript of sentencing. All six of these exhibits already have been introduced in evidence. Complainant shall be prepared to show how Mr. Flores' purported testimony is relevant to this case.

As to the remaining issues in this case, in view of the Chief Administrative Hearing Officer's (CAHO) November 17, 1997, modification of my October 17, 1997, Order Partially Granting Complainant's Motion for Summary Decision, I may have to revisit an issue that was discussed earlier in the case. With respect to the question of whether Respondent properly could be punished by the imposition of civil penalties both for counterfeiting a document and possessing the same document incident to its creation, during the July 30, 1997, prehearing conference I concluded that the statute authorized a cease and desist order and did not permit imposition of civil penalties for possession. PHC(2) Tr. at 52, 54. I further concluded that Complainant also had failed to show that Respondent "possessed" the document within the meaning of 8 U.S.C. § 1324c(a)(2). PHC(2) Tr. at 51. I emphasized that my decision was founded on statutory interpretation and not constitutional considerations. The CAHO held that section 1324(c)(a)(2) authorizes a civil money penalty for possession or providing. However, the decision did not address the issue of whether section 1324(c) authorizes multiple penalties for the same document. Therefore, the parties should be prepared to discuss whether or not the statute should be interpreted to permit assessment of multiple penalties based on counterfeiting/falsely making and possessing or providing the very same document.

Following the conference, Complainant shall be responsible, in conjunction with Respondent, for preparing and filing, not later than January 5, 1998, a proposed final prehearing order, which shall include the final list of witnesses for each party, the documents admitted in evidence, as well as those remaining on the exhibit list that have not yet been admitted, the stipulations, and the disputed issues of fact and law. See 28 C.F.R. § 68.13(c); Fed. R. Civ. P. 16(d), (e). The hearing will be governed by the terms of the prehearing order, and in their presentation of evidence the

parties shall be limited to the witnesses, exhibits, and issues listed in such Order. The order following a final prehearing conference will be modified *only to prevent manifest injustice*. See Fed. R. Civ. P. 16(e).

If a party or party's counsel fails to obey this order, fails to attend the conference without good cause, is substantially unprepared to participate in the conference, or fails to participate in good faith, upon motion by the opposing party or on the Judge's own initiative, sanctions may be imposed on the party and/or counsel, including either dismissal of the complaint or the request for hearing, as appropriate. See 28 C.F.R. §§ 68.1, 68.23, 68.28, and 68.37.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of December, 1997, I have served the foregoing Amended Notice of Final Prehearing Conference on the following persons, by first class mail (unless otherwise indicated), at the addresses shown:

Jane H. Thomson
Assistant District Counsel
Immigration and Naturalization Service
P.O. Box 34178
San Antonio, TX 78265-4178
(Counsel for Complainant)
(by fax and first class mail)

Michael A. Chovanec, P.C.
Attorney at Law
Greatview Office Center
8207 Callaghan Road, Suite 425
San Antonio, TX 78230
(Counsel for Respondent)
(by fax and first class mail)

Dea Carpenter
Associate General Counsel
Immigration and Naturalization Service
425 "I" Street, N.W., Room 6100
Washington, D.C. 20536

Office of the Chief Administrative Hearing Officer
Skyline Tower Building
5107 Leesburg Pike, Suite 2519
Falls Church, Virginia 22041
(hand delivered)

Linda S. Hudecz
Legal Technician to Robert L. Barton, Jr.
Administrative Law Judge
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
Telephone No.: (703) 305-1739
FAX No.: (703) 305-1515